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CONSTITUTIONS, STATUTES AND RULES

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MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

JAMES V. GILES and JOHN G. GILES,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

James V. Giles and John G. Giles petition for a writ of certiorari to review a judgment of the Court of Appeals of Maryland which reversed a judgment of the Circuit Court for Montgomery County, Maryland, ordering in a post-conviction proceeding that petitioners be granted a new trial following convictions for rape.

OPINION BELOW

The opinion of the Court of Appeals of Maryland (R. 231-62; Appendix B, *infra*) is reported at 239 Md. 458, 212 A.2d 101.

JURISDICTION

The judgment of the Court of Appeals of Maryland (Appendix B, *infra*) was entered and filed on July 13, 1965 (R. 231, 252). The jurisdiction of this Court is conferred by 28 U.S. Code § 1257(3), petitioners claiming rights, privileges and immunities under the Constitution of the United States, as more particularly set forth hereafter.

QUESTIONS PRESENTED

1. Whether petitioners were convicted in violation of the due process clause of the Fourteenth Amendment to the United States Constitution by reason of the State's suppression of material exculpatory evidence.

2. Whether, in holding that petitioners were not denied due process by State suppression of exculpatory evidence, the Court of Appeals of Maryland applied erroneous principles with respect to three elements of the suppression doctrine — materiality, prosecution knowledge, and absence of defense knowledge.

3. Whether, in view of Maryland's unique doctrine that the jury is the judge of the law, the Court of Appeals denied petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment by denying relief on the ground that certain of the suppressed evidence, though it concededly "could reasonably be considered admissible and useful to the defense," did not have sufficient exculpatory value.

4. Whether petitioners were denied their right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, by the receipt at their criminal trial of evidence of admissions made by them (a) under police interrogation while they were under arrest and prime suspects, (b) without warning of their right to remain silent, (c) while they were without counsel, and (d) when they were indigent, but (e) prior to their having requested counsel.

5. Whether petitioners were deprived of due process of law by application of the Maryland rule that new trial motions based on newly discovered evidence must be filed within three days after verdict.

STATUTES AND RULES INVOLVED

The pertinent provisions appear in Appendix A, *infra*.

STATEMENT OF THE CASE

The judgment sought to be reviewed is the culmination of a proceeding brought under Maryland's statutory substitute for habeas corpus, the Post Conviction Procedure Act, Md. Code (1957), Cum. Supp. (1964), Art. 27, § 654A; *infra*, Appendix A. Petitioners were convicted of rape in the Circuit Court for Montgomery County, Maryland. After exhausting all appeals, and after commutation of their death sentences to life imprisonment, petitioners filed a petition under that Act alleging that their convictions had been unconstitutionally procured. (R. 8-14.) Following an evidentiary hearing, the Circuit Court for Montgomery County ordered a new trial on the ground that petitioners had been denied due process of law under the Fourteenth Amendment by reason of the State's suppression at their criminal trial of material exculpatory evidence (R. 164). The Court of Appeals of Maryland, sitting en banc, reversed, two judges dissenting (R. 231-62).

A. THE CRIMINAL PROCEEDINGS.[1]

Petitioners are brothers, aged 20 and 22, respectively, at the time of trial in December 1961 (Ex. 1, pp. 134, 163). Because of their indigency petitioners were represented at the criminal trial by court-appointed counsel

[1] The transcript of the criminal trial was admitted in the post-conviction hearing as Petitioners Exhibit 1 (R. 39). It is contained in the original record filed with the certified record pursuant to Rule 21(3). The transcript is here cited Ex. 1.

(R. 235). Petitioners are Negroes. The alleged victim was a 16-year-old white girl. The jury was all white. (R. 217, 232, 234; Ex. 1, pp. 1-2.) Petitioners' defense was that the girl had solicited sexual intercourse (R. 155-56).[2]

The evidence at the criminal trial may be summarized as follows:

On the night of July 20, 1961, Joyce Roberts, aged 16, accompanied by three men, drove by automobile into woods along the Patuxent River in Montgomery County, Maryland The car ran out of gas, and two of the men left, leaving Joyce and Stewart Foster in the parked car. (R. 217-18.)

James Giles, John Giles, Joseph Johnson and John Bowie had been fishing and swimming in the river. Bowie's car, parked at the river, was guided by them past Foster's car, and Bowie drove off. (Ex. 1, pp. 24-29, 33, 58-59, 135-37.) One of the Giles brothers or Johnson asked Foster for a cigarette (R. 89; Ex. 1, pp. 137, 166). An altercation ensued. Foster and Joyce Roberts testified that the three young Negroes demanded his money and the girl (Ex. 1, pp. 34, 59). The Giles brothers testified that the altercation had been provoked by Foster's calling them obscene racist names (Ex. 1, pp. 137-38, 166, 180, 182).[3]

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[2] Maryland has two statutory "ages of consent" — 14 for the purposes of a felony prosecution, 16 for a misdemeanor. Md. Code (1957) Art. 27, §§ 462, 464. Sexual intercourse with the prosecutrix was admitted by James Giles and denied by John Giles (R. 234).

[3] Johnson did not testify at petitioners' trial. He was also indicted for rape, but his case was severed and transferred to Anne Arundel County. Johnson was convicted and sentenced to death, which sentence was commuted by the Governor to life imprisonment. A post-conviction petition filed for Johnson is being held in abeyance pending disposition of the present case.

James Giles and Johnson threw rocks or stones at the car (Ex. 1, pp. 59-60, 138-39). Joyce Roberts left the car and ran into the woods for a distance of thirty feet, where, she testified, she stopped because she fell and was out of breath (R. 218-19). Foster left the car, was knocked down by Johnson, and ran off to the nearest home where an occupant called the police (Ex. 1, pp. 35, 61-62).

While the altercation was still going on at the car, John Giles took a trail into the woods and came upon Joyce Roberts. They stayed together and conversed for about ten minutes. (Ex. 1, pp. 139, 151; R. 219, 221.) According to both Joyce (R. 221) and John Giles (Ex. 1, p. 139), she offered to have sexual intercourse with him if he helped her get away. John Giles testified (Ex. 1, pp. 139, 151), and Joyce denied (Ex. 1, pp. 84-86), that she also told him that she was on probation and didn't want to get into trouble.

James Giles and Johnson left the car, entered the woods, and came upon Joyce and John Giles (Ex. 1, pp. 168-69). According to the Giles brothers (Ex. 1, pp. 140, 155, 169), but contrary to Joyce's testimony (Ex. 1, p. 62), Joyce called to James Giles and Johnson when they approached.

According to Joyce's testimony, the three men "leaned around" and were kissing her. "One of the boys reached for the zipper in my shorts and I said 'No' and one of them said 'Either you do it or we will do it' and so I said 'I will' and I took my shorts and underpants off." The three men then had sexual intercourse with her. Joyce did not call out or resist, nor did she make any protests against having intercourse. She had the intercourse because she was afraid. (R. 219-21; Ex. 1, pp. 63-64, 87.)

According to the testimony of the Giles brothers, Joyce invited them and Johnson to have intercourse with her. She removed her clothes entirely on her own volition. She was not threatened or held. She directed the order

in which the men should have intercourse with her. She told them that she had had sexual intercourse with 16 or 17 boys that week and two or three more wouldn't make any difference. She also said that she was in trouble and couldn't afford to be caught with them and that if she were caught in the woods she would have to say she was raped. James Giles and Johnson had intercourse with her. John Giles did not. (Ex. 1, pp. 140-41, 152, 156, 169-70, 172-74, 192-96.)

On redirect examination by the State, Joyce testified that she had not been on probation at the time of the episode (R. 222). On cross-examination of the Giles brothers, the prosecutors ridiculed the defense testimony that Joyce had said she was on probation (R. 223-25).

A physician who examined Joyce Roberts immediately after the episode testified to finding evidence of sexual intercourse. He gave no testimony indicating forcible penetration. (R. 216-17.)

The State also introduced evidence of certain statements made by petitioners to the police following their arrest. These statements and the circumstances under which they were given are discussed *infra*, pp. 12-13.

The jury returned a verdict of guilty against each petitioner on December 5, 1961. On December 11, 1961, the trial court (Judge James H. Pugh) sentenced petitioners to death. (R. 8.)

The convictions were affirmed by the Maryland Court of Appeals, *Giles v. State*, 229 Md. 370, 183 A.2d 359, and an appeal to this Court was dismissed for want of a substantial federal question. *Giles v. Maryland*, 372 U.S. 767.

On November 16, 1962, petitioners moved in the trial court for a new trial on grounds of newly-discovered evidence. The motion was denied, and the denial was affirmed by the Court of Appeals on May 6, 1963, on the ground that the Maryland Rules require such a motion to

be filed within three days after verdict. *Giles v. State*, 231 Md. 387, 190 A.2d 627. (R. 10.) On October 24, 1963, Governor J. Millard Tawes commuted petitioners' sentences to life imprisonment (R. 8).

B. THE POST-CONVICTION PROCEEDING.

On May 11, 1964, petitioners filed in the trial court a petition seeking to set aside their convictions under the Post Conviction Procedure Act (R. 8-33). The petition alleged that their convictions had been procured in violation of the United States Constitution in several respects, of which the following claims survive: (a) that the State had suppressed material exculpatory evidence in violation of the due process clause of the Fourteenth Amendment; (b) that petitioners were denied due process because the Maryland rule requiring that new trial motions based on newly-discovered evidence be filed within three days after verdict unreasonably prevented petitioners from proving their innocence by such evidence (R. 8). At the post conviction hearing, the trial court allowed the petition to be amended to include an additional ground: that petitioners had been denied their right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments by the receipt at the criminal trial of evidence of admissions made by them to the police while they were under arrest and prime suspects, without counsel, and unwarned of their right to remain silent (R. 89-90).

On November 10, 1964, the trial court (Judge Walter H. Moorman) found that petitioners had been denied due process under the Fourteenth Amendment by reason of the State's suppression of evidence and ordered that petitioners be accorded a new trial (R. 164). The other claims made by petitioners were denied (R. 159-60). On appeal by the State, the Court of Appeals of Maryland, two judges dissenting, reversed, holding that there had not been an unconstitutional suppression of evidence and agreeing with the rulings of the trial court that were adverse to petitioners (R. 231-62).

1. The claimed suppression of evidence.

The evidence claimed to be suppressed falls into two categories: (1) certain incidents which occurred between the date of the alleged rape (July 20, 1961) and the beginning of petitioners' criminal trial (December 4, 1961), and (2) what we call Joyce Roberts' "near-probation status." We next set forth separately the evidence adduced at the post-conviction proceeding relevant to each category.

The incidents following the alleged rape. On the night of August 26, 1961, Joyce Roberts attended a party in Edmonston, Prince George's County, Maryland. There she had sexual intercourse with one man in the bathroom and with another in the yard outside the house. (R. 30-32, 65-68, 236.)

In the early morning of August 27, 1961, Joyce took a large overdose of pills. She was placed in the psychiatric ward of Prince George's General Hospital for ten days, the hospital record showing a diagnosis of attempted suicide and psycopathic personality and that her chief complaint was "Don't want to live." (R. 226-27, 31, 43, 49-50, 98-99, 157-58, 236, 238.)

While in the hospital, Joyce was visited by a friend, Robert Bostic. Joyce told him that she had taken the overdose of pills because she had been raped at the August 26 party by the two men with whom she had had intercourse that night. Bostic relayed this information to Joyce's mother, and a formal complaint of rape against the two men was lodged with the police by Joyce's father. (R. 31-32, 60, 65-73, 237.)

As a result of the complaint, Detective Sergeant Wheeler, of the Prince George's County police, visited Joyce Roberts on September 1, 1961, in the psychiatric ward of the hospital. Joyce first told Wheeler that the two men at the party had had sexual relations with her against her will. When Wheeler questioned her further,

she admitted that she had offered only token resistance to the first man — merely removing his hands from her body several times — and no resistance at all to the other man, and that no threats had been made to her. She told Wheeler that she had been reluctant at that time to have intercourse with the two men only because she thought that if she did so, they would tell the other boys at the party and all of them would want to have intercourse with her. Were it not for this apprehension, she said, she would willingly have had intercourse with both men. Joyce also told Wheeler that she had voluntarily engaged in sexual intercourse in the past with one of the two men. She further admitted that during the preceding two years she had had numerous acts of sexual intercourse with a large number of boys and men, many of whom were unknown to her, and that she had engaged in oral sodomy on numerous occasions. When asked by Wheeler why she had accused the two men of rape, she said that she had told Bostic this to explain why she took the overdose of pills. She also told Wheeler that she would refuse to testify against the two men if they were charged with rape. Wheeler marked the police file "closed unfounded." (R. 31-33, 60-72, 236-38.)

On or soon after September 1, 1961, Wheeler learned that Joyce Roberts had allegedly been raped in Montgomery County (R. 70). He was not interviewed by the State's Attorney or police of Montgomery County (R. 72).

At the post conviction hearing, petitioners introduced psychiatric testimony that an attempted suicide by a 16-year old girl is a strong indication of serious mental illness (R. 120-25).

The Court of Appeals held that, for the purposes of the rule that prosecution suppression of material exculpatory evidence violates due process, the prosecutor (in Maryland, the State's Attorney for the particular county) was charged with any knowledge of the Montgomery County police, but not with knowledge of police of other counties (R. 245-46).

Detective Lieutenant Whalen of the Montgomery County police was in charge of the police investigation of the alleged rape of Joyce Roberts by petitioners and Johnson (R. 76-77). As was found below, both Whalen and Leonard T. Kardy, the State's Attorney of Montgomery County, knew, prior to petitioners' criminal trial, that Joyce had attempted suicide (R. 246, 157, 80, 132-33). As also found below, both Whalen and the State's Attorney learned, prior to petitioners' trial, that Joyce had allegedly been raped again, and the State's Attorney knew that there had been no prosecution for this second alleged rape (R. 246, 238, 157, 81, 133-34). Whalen also knew that Joyce's mother had taken her to see a psychiatrist (R. 246, 237, 82). When Joyce's family told Whalen that Joyce had again been raped, this time in Prince George's County, he advised them to report to the authorities of that county, and then paid no further attention to the matter (R. 81, 237). The Montgomery County police and prosecutor made no investigation of the character, background or record of Joyce Roberts (R. 79, 81, 84, 130, 133-34, 237).

As a result of this lassitude, neither the State's Attorney nor Lieutenant Whalen knew the following things which Sergeant Wheeler knew but did not bother to communicate to the Montgomery County authorities: (1) that Joyce had related to Wheeler a fantastic history of sexual promiscuity, (2) that she had initiated the second rape accusation, (3) that the accusation was palpably false, and (4) that she had been hospitalized in a psychiatric ward.

Prior to and during the trial, the defense knew nothing about the incidents which we have described. When the lawyers assigned to defend petitioners and Johnson visited the Roberts' home in an attempt to see Joyce Rob-

erts, they were denied access to her by Joyce's mother.[4] The mother also refused to discuss the case with them, saying that she had been so instructed by Lieutenant Whalen. (R. 91-94.)

Joyce Roberts' near-probation status. As already related, petitioners testified at their criminal trial, and Joyce Roberts denied, that while they were in the woods and prior to any sexual intercourse, Joyce told them that she was on probation, that she was in trouble, that she could not afford to be caught with them, and that if caught she would have to claim that she was raped. Joyce testified, under redirect examination by the State, that she had not been on probation, and on cross-examination of petitioners the prosecutors ridiculed their testimony that she had said she was on probation. *Supra*, pp. 5-6.

It was stipulated at the post-conviction hearing that at the time of the alleged rape, July 20, 1961, there was pending in the Juvenile Court for Prince George's County Maryland, a petition alleging that Joyce was beyond parental control and a recommendation of the court's case worker that Joyce be put on probation (R. 55-56). There was also introduced at the post-conviction hearing uncontradicted evidence that Joyce knew of her near-probation status on July 20, 1961, regarded it as actual probation, and was worried about getting into more trouble. This evidence consisted of testimony of one of Joyce's boy friends, John Patrick Stephens, that on the Saturday be-

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[4] Moreover, Joyce was undoubtedly not at home. Unbeknownst to defense counsel (R. 93), the State's Attorney and Whalen, desiring to have Joyce "in protective custody," arranged to have the Juvenile Court of Montgomery County commit Joyce to a State School for Girls on September 5, 1961 (R. 77, 85-87, 131, 228-30). This was done even though Joyce was a resident of Prince George's County (R. 87). On April 30, 1962, the Juvenile Court of Montgomery County marked its file "Closed - No longer [sic] residing within the jurisdiction of the Court" (R. 230).

fore July 30, 1961 (a Thursday), Joyce told him that "she did not want to go down into the Hyattsville, Maryland, area because she was in trouble on her probation" (R. 40).

After petitioners were arrested, they told the police that Joyce Roberts had told them she was on probation. This statement of petitioners was included in the police investigative file, which the State's Attorney saw. (R. 130.) Neither the State's Attorney nor the police made any attempt to ascertain whether Joyce Roberts was on probation on July 30, 1961 or otherwise to investigate her record and background (R. 130, 79, 81-82). Consequently, neither the State's Attorney nor the police of Montgomery County knew of Joyce's near-probation status (R. 129, 85).

Petitioners' assigned counsel did try to find out prior to the criminal trial whether there were Juvenile Court charges pending against Joyce Roberts in Montgomery County and Prince George's County, but was refused access to the court records (R. 93, 235-36). Thus all he knew about Joyce's status was what his clients had told him she had said to them (R. 93-94).

2. The claimed denial of the assistance of counsel.

After petitioners were arrested, they answered interrogations by the police, admitting, among other things, their presence at the scene of the alleged rape, an altercation with Foster, and sexual intercourse by James Giles and Johnson with Joyce Roberts. All of these admissions were made after the police had been led to petitioners by questioning John Bowie, petitioners' companion at the time they first encountered Joyce Roberts and Stewart Foster. Some of the admissions were made after petitioners had been identified in a line-up by Joyce Roberts. Hence petitioners were prime suspects at the time. The statements were made in the absence of any counsel for petitioners. Petitioners did not request

counsel. At petitioners' criminal trial, there was admitted in evidence a detective's testimony of the admissions made to the police by petitioners. (Ex. 1, pp. 106-25, 203-08.)

At the post-conviction hearing, the same detective testified that petitioners had not been advised, prior to making the statements, that they had a right to be silent (R. 88-89).

The Court of Appeals held that the admission at the criminal trial of petitioners' statements to the police did not violate their constitutional right to the assistance of counsel (R. 241-42).

3. The Maryland rule on newly-discovered evidence.

Rules 567a and 759a of the Maryland Rules of Procedure (Appendix A, *infra*), promulgated by the Court of Appeals of Maryland, provide that a motion for a new trial must be filed within three days after the reception of a verdict. The Court of Appeals held, in a case brought by petitioners, that this rule applies to motions for a new trial based on newly-discovered evidence (R. 240-41, 10). *Giles v. State*, 231 Md. 387, 190 A.2d 627. It is also Maryland law that newly discovered evidence does not furnish grounds for relief in post-conviction proceedings, including habeas corpus, coram nobis, and the statutory substitute for those writs. *Daniels v. Warden*, 223 Md. 631, 161 A.2d 461; *Diggs v. Warden*, 221 Md. 624, 157 A.2d 453.

Petitioners assembled documented evidence, discovered more than three days after their conviction, which was highly probative of their innocence. Under Maryland law, described above, this evidence was, of course, not admissible at the post-conviction proceeding (see, e.g., R. 42, 75-76), except insofar as it related to the suppression claim.

The newly-discovered evidence included evidence of the following matters:[5]

(1) The matters mentioned in our preceding discussion of the suppression claims, including the attempted suicide, the second, unfounded rape accusation, the sexual promiscuity related by Joyce Roberts to Wheeler, her confinement in a psychiatric ward, and her near-probation status.

(2) On the Saturday before her alleged rape by petitioners, Joyce Roberts told her friend, Stephens, that at a party the preceding week-end she had had sexual relations with sixteen boys (R. 41). This evidence obviously would have corroborated petitioners' trial testimony, contradicted by Joyce, that she had told them virtually the same story on the day of the alleged rape.

(3) Joyce Roberts manifested an insouciant attitude toward the alleged rape. A day or two after the episode, she told a man friend that the Negroes who had raped her "were bigger and better than white boys" (R. 59, 23). Within a week after, she flippantly told a restaurant owner who asked her what had happened that "one or two more did not make that much difference to her" (R. 21).

(4) Joyce manifested promiscuous and depraved sexual behavior on numerous occasions (R. 16-17, 22-23, 40).

(5) Stewart Foster, who, according to petitioners' testimony, had provoked the altercation at the car by calling petitioners' obscene, racist names (*Supra*, p. 4), was an habitual brawler and frequently employed the peculiar epithet ascribed to him by petitioners (R. 19-20, 22, 25, 27, 76).

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[5] Our description includes material from the following sources: affidavits appended to the post-conviction petition, offers of proof at the post-conviction hearing, some testimony which managed to enter the record of that hearing.

(6) In conversations with friends after the alleged rape, Foster gave accounts of the altercation at the car which corresponded to petitioners' version of how the altercation came about (R. 17, 18-19, 75).

The Court of Appeals held that petitioners were not denied due process of law by the application of the Maryland law precluding judicial consideration of evidence discovered more than three days after verdict (R. 240-41).

C. THE RAISING AND DISPOSITION OF THE FEDERAL QUESTIONS.

In their petition under the Maryland Post Conviction Procedure Act, filed in the Circuit Court for Montgomery County, Maryland, petitioners included the following allegations raising the federal questions concerning suppression of evidence and the Maryland law precluding relief on the basis of evidence discovered more than three days after verdict:

> "3. The grounds upon which this Petition is based are that petitioners are imprisoned in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article 23 of the Bill of Rights of the Maryland Constitution in that . . . (b) the State suppressed and withheld material exculpatory evidence and thereby was enabled to, and did, give at the trial a false and misleading impression of the facts; and (c) petitioners have been denied a reasonable opportunity to obtain a new trial on the basis of material exculpatory evidence which was discovered after their convictions and was not available to them at the trial." (R. 8.)

At the hearing, the trial court allowed an amendment of the petition adding the federal question concerning denial of the assistance of counsel, as follows:

> "Petitioners were denied the 'Assistance of Counsel' in violation of the Sixth Amendment to the United States Constitution, made obligatory upon the State by the Fourteenth

> Amendment, in that at petitioners' trial there was admitted evidence of statements made by them to the police after their arrests in response to interrogations designed to elicit incriminating statements, although petitioners had not been warned of their constitutional right to remain silent." (R. 89-90.)

The trial court decided the federal question of the suppression of evidence in petitioners' favor, holding (R. 164) "that petitioners were denied due process of law under the Fourteenth Amendment to the Constitution of the United States in that the State withheld from the defense and suppressed" described evidence. The federal questions concerning the inability to obtain a new trial on the basis of after-discovered evidence and denial of the assistance of counsel were decided by the trial court adversely to petitioners on the merits (R. 163-64).

In the Court of Appeals of Maryland petitioners were appellees on an appeal by the State. Petitioners raised and argued in their brief the federal questions described above. Point I of petitioners' Argument was captioned as follows (R. 175):

> "I. Appellees were denied due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article 23 of the Maryland Bill of Rights by reason of the State's withholding of material exculpatory evidence."

Point II B. of the Argument in petitioners' brief was captioned (R. 206):

> "B. Application of the Maryland Rule Requiring That New Trial Motions Based on Newly-Discovered Evidence be Made Within Three Days After Verdict Violates Appellees' Rights Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution."

Point II C. of the Argument in petitioners' brief was captioned (R. 207):

> "C. The Admission at Appellees' Criminal Trial of Evidence of Statements Made by Them to the Police Violated Appellees' Right to the Assistance of Counsel, Guaranteed by the Sixth Amendment to the United States Constitution, Made Applicable to the States by the Fourteenth Amendment."

The Maryland Court of Appeals decided each of these three points adversely to petitioners on the merits (R. 240-42, 252).

Our equal protection question (number 3 of our Questions Presented) raises the contention that petitioners were denied equal protection by the decision of the Court of Appeals by reason of the grounds on which that court based its reversal of the trial court. Accordingly, the question did not exist and could not be raised by petitioners prior to the decision of the Court of Appeals. Therefore the Court of Appeals decided the question by its decision and the question may be reviewed by this Court. *Brady v. Maryland*, 373 U.S. 83; *Cole v. Arkansas*, 333 U.S. 196.

REASONS FOR ALLOWING THE WRIT

A. THE SUPPRESSION OF EVIDENCE QUESTIONS

1. As we later show, this case presents major issues concerning the meaning and application of the doctrine that prosecution suppression of exculpatory evidence is a violation of due process which vitiates a conviction. These issues have never been resolved by this Court. Indeed, the Court has barely touched on the doctrine, which — unlike other modern advances in criminal jurisprudence — has been developed by state and lower federal courts. This grass-roots development indicates that the doctrine is a necessary response to advancing demands for the fair administration of criminal justice

and for a reduction of the handicaps of impoverished defendants.

Because of the social importance of the suppression doctrine, because its development without illumination from this Court has been uneven and incomplete, and because its uncertainties are recurring, we believe that it is time for the Court to contribute its guidance in this field on the first appropriate occasion.

This case is that occasion. The issues involved are basic to the suppression doctrine. They are squarely presented. The record is adequate and will hardly be improved by remitting petitioners to federal habeas corpus proceedings. The issues are such that no decision at a level below this Court will be a dispositive precedent, nor will such a decision even conclude the litigation. The decision of the issues by the court below is highly debatable. This appears not only from our later discussion but also from the fact that in a conservative jurisdiction the trial court found, and two dissenters of the Court of Appeals agreed, that the State had in truth procured an unconstitutional conviction and sentences of death by suppressing material exculpatory evidence.

Still other considerations call for the Court to review now the substantial questions presented by this case. Petitioners have been imprisoned for more than four years, of which two were spent on death row prior to commutation of their sentences to life imprisonment. Yet the newly discovered evidence, which the Maryland courts have precluded themselves from considering by a perverse procedural rule, must convince any reasonable mind that petitioners are the innocent victims of a monstrous miscarriage of justice (see *supra*, pp. 13-15).[6] This case —

[6] At petitioners' clemency hearing there were presented letters to the Governor from five of the jurors in petitioners' criminal trial who had seen the new evidence which had by then been discovered, stating that if they knew at the trial what they now knew they would not have voted to convict. Kempton, Clemency in Annapolis, New Republic, Oct. 26, 1963, pp. 6, 8.

"often called the 'Little Scottsboro Case'" (N. Y. Times, July 14, 1965) — has aroused extensive public doubts about our system of criminal justice. These doubts will not be allayed short of this Court's review.

2. The suppression doctrine originates with *Pyle v. Kansas*, 317 U.S. 213, which declared unconstitutional convictions obtained by the State's knowing use of perjured testimony and suppression of evidence favorable to the accused. See also *Mooney v. Holohan*, 294 U.S. 103; cf. *Alcorta v. Texas*, 355 U.S. 28; *Napue v. Illinois*, 360 U.S. 264. But it was not until 1963 that the Court, following a path blazed by other courts, extended *Pyle* to cases in which the suppression of exculpatory evidence was not accompanied by testimony known to the prosecution to be false or misleading. *Brady v. Maryland*, 373 U.S. 83. *Brady* remains the one such suppression case decided by this Court.

Brady stated (at 87):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

Brady leaves unanswered many questions. Is the "upon request" qualification of the quoted passage an indispensable element of the suppression doctrine? The court below held the contrary, as do the authorities generally. *Barbee v. Warden*, 331 F.2d 842, 845 (4th Cir.); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 137 (2d Cir.); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir.); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir.); *Ashley v. Texas*, 319 F.2d 80 (5th Cir.); *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill.); *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md.); *Application of Kapatos*, 208 F. Supp. 883 (S.D. N.Y.); *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings Cty. Ct.).

What is the standard for determining whether undisclosed evidence is "material?" Is "materiality" determined merely by what the prosecution knew or also by what the defense would have discovered if the prosecution had disclosed what it knew? Whose knowledge constitutes knowledge of "the prosecution?" Is the prosecution charged not only with its actual knowledge but also with constructive knowledge of facts it would have discovered by rudimentary diligence? What constitutes absence of knowledge of the defense? All these questions are sharply posed by this case.

3. The Court of Appeals held (R. 252), over vigorous dissent (R. 254-62), that the evidence of the prosecutrix' attempted suicide and the second rape accusation was not material and that therefore its non-disclosure by the prosecution was not a violation of due process.

The threshold question is what is the test of materiality. In the cognate situation of prosecution use of testimony known to be false, the standard of materiality is whether "the false testimony . . . may have had an effect on the outcome of the trial." *Napue v. Illinois*, 360 U.S. 264, 272. Similarly, where unconstitutionally obtained evidence has been admitted, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87.

Those were cases in which the constitutional vice was the admission of evidence. It would appear that a similar standard should apply where the vice is the non-disclosure of evidence. Hence the test in a suppression case should be whether the undisclosed evidence, if revealed, might have affected the outcome of the trial. This test was in fact applied by the Maryland Court of Appeals in *Brady v. State*, 226 Md. 422, 174 A.2d 167, aff'd sub nom.

Brady v. Maryland, supra,[7] as well as by other courts. *Barbee v. Warden*, 331 F.2d 842, 847 (4th Cir.) ("One cannot possibly say with confidence that such a defect in trial was harmless"); *Smallwood v. Warden*, 205 F. Supp. 325, 330 (D. Md.) (the withheld evidence "might well have affected the result of the trial"); *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281, 284 (Kings Cty. Ct.) (the withheld evidence "could have been helpful to the defendant"); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir.) (the withheld evidence was cumulative). Cf. *Griffin v. United States*, 183 F.2d 990 (D.C. Cir.).

A standard less favorable to the accused is particularly inappropriate in a case like this one — a capital case, indigent defendants, and a Maryland rule which, by precluding new trials on the basis of after-discovered evidence, gives unusual finality to criminal trials. And see *infra*, p. 31, as to the effect of the Maryland rule that the jury is the judge of the law.

The Court of Appeals conceded that the prosecution had suppressed evidence of the attempted suicide and the second rape accusation (R. 246-47). We claim, as later appears, that the suppression was of much more. But even the evidence concededly suppressed more than meets our suggested standard that its disclosure might have affected the result.

At the criminal trial, the case came down to an issue of credibility between the prosecutrix and the accused. See *supra*, pp. 5-6; *Giles v. State*, 229 Md. 370, 381, 183 A.2d 359, 364; *Johnson v. State*, 232 Md. 199, 205, 192 A.2d 506, 509. Petitioners offered nothing to impeach the credibility of Joyce Roberts or to corroborate their

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[7] The court in *Brady* expressed its "considerable doubt as to how much good" the undisclosed evidence would have done the accused. 226 Md. at 429, 174 A.2d at 171. It then held that "it would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence. . . ." 226 Md. at 430, 174 A.2d at 171.

version of the events. An all-white jury had to decide between believing the unimpeached testimony of a young white girl and the uncorroborated testimony of Negro defendants that she had solicited sexual intercourse. The result was a foregone conclusion. This would not have been true had the defense been able to produce and to use on cross-examination the evidence admittedly suppressed, not to mention the other evidence which we claim was suppressed.

Evidence indicating mental illness or emotional disturbance is relevant to impeach a witness' credibility.[8] Such evidence goes not to character, but to the capacity and ability of the witness accurately to perceive and describe his or her experiences and, in sex cases, to the witness' bias against a class (men) to which the accused belong. 3 Wigmore, Evidence (3d Ed. 1940) § 931. Suppression of evidence indicating possible mental illness of a State's witness requires habeas corpus relief. *Powell*

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[8] Among the types of evidence included in this category are the following: Instances of aberrant behavior. *People v. Cowles*, 248 Mich. 429, 224 N.W. 387; *Miller v. State*, 49 Okla. Cr. 133, 295 Pac. 403; *People v. Bastian*, 330 Mich. 457, 47 N.W.2d 692; *State v. Poolos*, 241 N.C. 382, 85 S.E.2d 342. Past confinement in a mental institution. *Powell v. Wiman*, 287 F.2d 275 (5th Cir.); *United States v. Pugliese*, 153 F.2d 497, 499 (2d Cir.); *People v. Kirkes*, 243 P.2d 816, 832 (Dist. Ct. App.), aff'd, 39 Cal. 2d 719, 249 P.2d 1; *Walley v. State*, 240 Wis. 136, 126 So.2d 534. Psychiatric testimony, whether based on observation of the witness or on instances of aberrant behavior. *Powell v. Wiman*, 293 F.2d 605 (5th Cir.); *Ashley v. Texas*, 319 F.2d 80 (5th Cir.); *Ceffin v. Reichard*, 148 F.2d 278, 280 (6th Cir.); *United States v. Hiss*, 88 F. Supp. 559 (S.D. N.Y.); *Taborsky v. State*, 142 Conn. 619, 629-30, 116 A.2d 433, 437-38; *People v. Cowles*, *supra*; *Rice v. State*, 195 Wis. 181, 217 N.W.2d 697; *Bouldin v. State*, 87 Tex. Cr. R. 419, 222 S.W. 555; *State v. Wesler*, 137 N.J.L. 311, 59 A.2d 884, aff'd, 1 N.J. 68, 61 A.2d 746. In sex cases, instances of prior accusations of sexual molestation. *Rice v. State*, *supra*; *State v. Wesler*, *supra*; *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md.).

v. Wiman, 287 F.2d 275 (5th Cir.); *Powell v. Wiman*, 293 F.2d 605 (5th Cir.); *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md.); *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill.). Evidence of emotional disturbance is particularly important in sex cases because modern medical science has established the existence among some young girls and women of a psychic compulsion "of contriving offenses by men." 3 Wigmore, *op. cit.*, § 924a.

The evidence of a second rape accusation, made one month after the alleged rape by petitioners and three months before trial, obviously indicated that such a compulsion existed here. Suppression of a prior rape accusation was one of the grounds for granting habeas corpus relief in the rape case of *Smallwood v. Warden*, *supra*. And prior accusations of sexual molestation are admissible in prosecutions for sex offenses. *Rice v. State*, 195 Wis. 181, 217 N.W.2d 697; *State v. Wosler*, 137 N.J.L. 311, 59 A.2d 834, aff'd, 1 N.J. 58, 61 A.2d 746.

The psychiatric testimony at the post-conviction hearing established that the suicide attempt was highly indicative of serious mental illness (*supra*, p. 9). And even without such testimony, evidence of attempted suicide is admissible to impeach a witness' credibility. *State v. Poolos*, 241 N.C. 382, 85 S.E.2d 342; see *United States v. Soblen*, 391 F.2d 236, 242 (2d Cir.).

In holding that the admittedly suppressed evidence was immaterial, the court below inverted the correct standard. The court applied not the principle that suppressed evidence is material if it might have affected the result, but rather a principle that the evidence is immaterial if it might not have affected the result.

The court's stated theory of materiality was as follows: (R. 245):

> "We think that in order for the nondisclosure of evidence to amount to a denial of due process it must be such as is material and

> capable of clearing or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in addition to being such as could reasonably be considered admissible and useful to the defense."

This passage makes a distinction between two concepts — "useful to the defense" and "tending to clear the accused" — which by normal usage mean the same thing. The explanation of the court's distinction is that it gave a unique meaning to "tending to clear the accused" — that evidence has such a "tendency" only if it is foolproof. This appears from the following ways in which the court speculated about the withheld evidence:

(1) Mental illness of the prosecutrix on August 26, 1961, the date of the attempted suicide, would not be material for impeaching her credibility because her testimony was given some three months later, on December 4, 1961 (R. 247-48).[9]

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[9] The court justified this conclusion by asserting (R. 247-48) that the psychiatrist who testified in the post-conviction proceeding stated that the attempted suicide on August 26 would not permit an opinion as to the prosecutrix' mental condition at the date of trial. The assertion represents a misreading of the testimony. The psychiatrist first did express an opinion on the subject, saying that "there is a substantial risk that she would still be mentally ill three-and-a-half months later" (R. 122). Then occurred a confusing exchange with the trial judge, in which the witness' response could be interpreted to mean that he could not give such an opinion (R. 122-23). But the witness then contradicted the apparent contradiction by testifying that he did have an opinion about how the mental illness would affect the person's credibility as a witness (R. 124). The trial court inexplicably sustained objections to the efforts of petitioners' counsel to clarify the testimony (R. 124-125). In any event, it takes no psychiatrist to appreciate that even if the prosecutrix had recovered from mental illness, the existence of such illness at the time of the episode or between the episode and the trial could well have affected her ability to recall the episode accurately even if it did not affect her veracity at the trial.

(2) The attempted suicide was not material because the jury might have concluded (incorrectly) that it was indicative of emotional disturbance caused by the prosecutrix' alleged rape by petitioners and Johnson (R. 248).

(3) In unwitting contradiction of (2), the attempted suicide was not material because it "was an outgrowth of an incident totally unrelated" to the alleged rape by petitioners (R. 249).

(4) The prosecutrix' second rape accusation was not material because it was made to her boy friend and not to the police (R. 251, 237).[10]

(5) Evidence indicative of mental illness was not material to impeach the prosecutrix' credibility, because it did not establish total incompetence as a witness or contradict her trial testimony (R. 249).

(6) Evidence that the prosecutrix was suffering from nymphomania would contribute "nothing to show . . . that she had consented" to sexual intercourse by petitioners (R. 251).

4. In determining the materiality of the concededly suppressed evidence, the court below considered only what the prosecution (the State's Attorney and Lieutenant Whalen) actually knew (R. 245-46). This knowledge, though significant, was incomplete because of the prosecution's indifference to the matters reported to them. The court did not take into account the further information which would have been acquired by a diligent defense

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[10] The court overstated the evidence in saying (R. 251) that Joyce Roberts denied to Sergeant Wheeler that any rape had occurred. She first told Wheeler that the two men at the Edmonston party "had had sexual relations with her against her will" (R. 65-66) — clearly an accusation of rape made to a police officer. Then, under questioning by Wheeler, she divulged the facts which showed her accusation was unfounded, without ever acknowledging that she had not in fact been raped.

if the prosecution had divulged its actual knowledge. Such a divulgence would have led the defense to Sergeant Wheeler and the hospital records. The information which would have been acquired from these sources would have solidified the materiality of the attempted suicide and the second rape accusations by eliminating any possibilities that the overdose of pills was accidental, that the second rape accusation was not initiated by Joyce Roberts, or that the accusation was true. The defense would also have discovered that Joyce had been hospitalized in a psychiatric ward and that she had given Wheeler an incredible history of wantonness.

Evidence of the latter facts had an independent materiality. Evidence of past confinement in a mental institution is admissible to impeach a witness' credibility. Cases cited *supra*, p. 22, ftn. 8. Suppression of such evidence concerning a State's witness requires habeas corpus relief. *Powell v. Wiman*, 287 F.2d 275 (5th Cir.). In sex prosecutions, evidence is admissible of the prosecutrix' possible nymphomania. *People v. Cowles*, 246 Mich. 429, 224 N.W. 387; *Miller v. State*, 49 Okla. Cr. 133, 295 Pac. 403; *People v. Bastian*, 330 Mich. 457, 47 N.W.2d 692. Moreover, the history of promiscuity related to Wheeler would have corroborated petitioners' trial testimony, thoroughly inconsistent with rape, that Joyce Roberts had told them that she had had intercourse with 16 or 17 other boys that week. For evidence of what she told Wheeler would have established the definite possibilities that she had had such an experience and that she would have recounted it.

Finally, if the defense had known the facts, it would undoubtedly have moved for and obtained a pre-trial mental examination of the prosecutrix. And considering the evidence eventually developed about her (*supra*, p. 14), such an examination might well have produced a diagnosis destructive of her credibility.

The dissent below urged (R. 260) that the information actually known to the State's Attorney and Lieutenant

Whalen was material not only because it was "important . . . of itself to the defense," but also because it was "usable as the basis for further investigation." We believe that the dissent has the better of the argument. This Court should settle whether the materiality of suppressed evidence (once it is conceded, as here, that the prosecution has a duty to disclose it) depends not merely on what an indifferent prosecution knew, but also on what a diligent defense would have learned if the prosecution had complied with its duty of disclosure?

5. One cannot dispute the materiality of the prosecutrix' near-probation status on the night of the alleged rape. Proof of that status, which a layman could well have described as "probation," and of which petitioners could not have known except from the prosecutrix, would have been important corroboration of petitioners' testimony that the prosecutrix had told them she was "on probation" and "in trouble," could not afford to be caught with them, and if caught would have to claim rape. See *supra*, p. 11. Such proof also would have eliminated the false impression engendered at the trial by the prosecution's ridicule of petitioners' testimony that Joyce Roberts had told them she was on probation and by Joyce's testimony that she was not on probation.

The court below held, without elucidation, that there was no suppression of evidence of the near-probation status (R. 252). Presumably the holding is based on the fact that neither the State's Attorney nor Lieutenant Whalen knew of the status. [11]

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[11] The cases hold, as did the decision below, that for the purposes of the suppression doctrine the prosecution is charged with the knowledge of the investigating police. *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir.); *Hall v. Warden*, 223 Md. 590, 158 A.2d 316. The prosecution is also responsible for false testimony by a policeman. *Strosnider v. Warden*, 228 Md. 663, 180 A.2d 854; *Curran v. Delaware*, 259 F.2d 707 (3d Cir.). There were no authorities prior to the negative holding below in this case (R. 246) on whether, for purposes of the suppression doctrine, the prosecution is charged with knowledge of the police of another county.

In our view, the prosecution should have been charged with knowledge of the near-probation status because its failure to obtain such knowledge was a result of a gross breach of its duty, owed both to the public and to persons accused, of exercising rudimentary diligence in criminal investigations. For the same reason the prosecution should also be charged with knowledge of all that Sergeant Wheeler knew.[12]

That the prosecutor and police were grossly negligent seems beyond question. The circumstances known to the police were such that any responsible police officer and prosecutor could not help but realize the need to investigate the character and background of the prosecutrix and to seek out whether there were facts to confirm the account of the accused.

The medical evidence showed sexual intercourse, but not forcible penetration (R. 216-17). By the prosecutrix' own story (R. 217-22): A 16-year-old girl was alone in the woods, late at night, with a 21-year-man. They had gone there with two other men. They were, she said, to be joined by two of her girl friends, but these never appeared. They were, she said, going swimming, but she had no bathing suit with her. When the altercation at the car started, she ran into the woods for only 30 feet. When John Giles joined her there, she quietly conversed with him for about ten minutes. She was the first to introduce the subject of sex, offering him intercourse if he helped her get away. When James Giles and Johnson joined them she offered no resistance to intercourse. Fright might explain the lack of resistance or outcry, but not her failure to ask to be let alone. (Her conversation with John Giles proved that she had not been struck dumb.)

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[12] And it may be that the State should also be charged with Wheeler's knowledge because of his negligence in failing to communicate his sensational information to the Montgomery County authorities when he learned of the case pending against petitioners. See *supra*, p. 9.

She was not threatened or subjected to violence. She removed her own clothes.

Along with this, petitioners' account to the police claimed consent and pointed to mental derangement and sexual promiscuity. Petitioners also told the police that Joyce had said she was on probation (R. 129). Lieutenant Whalen also knew that Joyce had been taken to a psychiatrist (R. 82). The charge was of a capital offense, and the indigent accused had no investigative resources.

Yet the State's Attorney and the police did not lift a finger to inquire into Joyce's record and character or to attempt to verify the account of the accused by checking whether she was "on probation." They maintained their passivity even after they had received news of the attempted suicide and the second rape accusation. *Supra*, p. 10. They also knew of specific important things to investigate — the suicide attempt, the second rape accusation, whether Joyce was on probation. The information they neglected to procure was readily obtainable by them, being in the hands of the authorities of an adjacent county

In short, the State's Attorney and the police determinedly avoided all possible exposure to information favoring the accused despite circumstances which cried for investigation. It is unbelievable that they would have shown the same apathy if the social and economic status of the protagonists had been reversed — if the accused had been white, middle-class youths and the complaining witness an impoverished Negro girl.

We ask the Court to decide whether for the purposes of the suppression doctrine the prosecution should be charged with knowledge of information it would have obtained but for its culpable negligence. The authorities, though meagre, indicate that the answer is in the affirmative.

Prosecution suppression of material evidence renders a conviction unconstitutional even though the State offi-

cials acted in good faith. *Brady v. Maryland*, 373 U.S. 83, 87. It follows that a negligent suppression of material evidence is unconstitutional.

Ordinarily, the negligence consists of a breach of duty to communicate evidence to the accused. But communication is not the only duty involved. Thus the State also has a duty to preserve exculpatory evidence, so that its negligent loss by the State renders a conviction unconstitutional. *Kyle v. United States*, 297 F.2d 507 (2d Cir.); *United States v. Heath*, 147 F. Supp. 877 (D. Hawaii); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir.).

What is involved here is a cognate duty, that of the State to exercise rudimentary diligence to acquire, and certainly not to avoid, relevant evidence. The existence of such a duty has been recognized. In *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill.), habeas corpus relief was granted on the ground that "the prosecution either knew or should have known" of important exculpatory evidence and was "charged with the knowledge" (at 390). The court also stated (at 387) that a prosecutor "must not willingly ignore that which is in an accused's favor."

Smith v. Commonwealth, 331 Mass. 585, 121 N.E.2d 707, holds that the prosecution has a duty to investigate an accused's reasonable claim of an alibi, even if the prosecutor in good faith believes that the defendant is guilty. *People v. Fishgold*, 71 N.Y. Supp. 2d 830 (Kings Cty. Ct.), recognizes the duty of the State to investigate the credibility of its witnesses. See also *In Re Imbler*, 35 Cal. Rptr. 293, 300, 387 P.2d 6, 13, stating: "We have no doubt that negligence of representatives of the state in preparing and presenting a criminal prosecution could in some cases result in a denial of a fair trial."

6. There can, of course, be no unconstitutional suppression of information known to the defense.

It is unquestioned that petitioners' assigned counsel had no knowledge of the information in Sergeant Wheeler's possession and that, as he testified (R. 92-93), all he knew of the background of Joyce Roberts was his clients' account to him of what she told them on the night of July 20, 1961. Counsel's attempt to get further information was frustrated by his inability to interview Joyce and to obtain Juvenile Court records. *Supra*, pp. 10-12.

Nevertheless, the Court of Appeals held that "the defense must have known of the prosecutrix' general reputation for unchastity and that she was a sexually promiscuous girl." This holding was based on the fact that petitioners' account to their counsel raised "some questions as to the character of the prosecutrix which properly could have been investigated." (R. 250.)

The court thus applied a double standard. It refused to charge the negligent prosecution with constructive knowledge. It charged the diligent defense counsel with constructive knowledge.

Moreover, other courts hold that prosecution withholding of exculpatory information not known to the defense is not excused even if the information would have been obtained by a diligent defense. *Barbee v. Warden*, 331 F.2d 842, 845 (4th Cir.); *People v. Hoffner*, 129 N.Y. Supp. 2d 833 (Queens Cty. Ct.).

7. The Court of Appeals held that the suppression of the evidence of the attempted suicide and second rape accusation, though concededly admissible (R. 246-47), did not constitute a violation of due process because the evidence was not material and its suppression not prejudicial. This holding denied petitioners the equal protection of the laws in view of Maryland's unique provision that the jury is the judge of both the law and the facts (Md. Constitution, Art. XV, § 5, *infra*, Appendix A). For by its holding the Court of Appeals substituted court determination for jury determination in an erratically selected class of cases — those in which the prosecution has suppressed admissible evidence.

Brady v. Maryland, 373 U.S. 83, held that the Court of Appeals had not violated equal protection by according no more than a new trial limited to the issue of punishment where the prosecution had suppressed evidence relevant only to punishment. The holding was based, however, on the fact that despite the Maryland provision on the authority of the jury, the Maryland courts had retained the power to determine the admissibility of evidence. Both the opinion of the Court and the dissenting opinion of Justices Harlan and Black recognized that the equal protection clause would have been violated by the holding of the Court of Appeals if the suppressed evidence had been admissible on the issue of guilt as well as punishment. See *Brady* at 89, 92-93.

In the present case, the Court of Appeals conceded that the suppressed evidence of the suicide attempt and second rape accusation was admissible on the issue of guilt. Hence *Brady v. Maryland* teaches that the Court of Appeals denied petitioners the equal protection of the laws by substituting its appraisal of the exculpatory value of the suppressed evidence for the jury's.

B. THE DENIAL OF COUNSEL QUESTION.

In *Escobedo v. Illinois*, 378 U.S. 478, 490-91, the Court held:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the

> Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The facts in this case correspond with those described in the quoted passage with one exception — here the indigent petitioners did not, prior to or during the police interrogation, request an opportunity to consult a lawyer. *Supra*, pp. 12-13. Since the right of counsel had attached when petitioners were interrogated, and since that right was not waived merely by a failure to demand it (*Massiah v. United States*, 377 U.S. 201), the distinction should make no difference. As Mr. Justice White pointed out in his dissent in *Escobedo* (at 495), "At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel."

Regardless of theory, there is an urgent necessity for the Court to decide whether or not the *Escobedo* doctrine applies in the absence of a request for counsel. For there is a hopeless conflict among the Circuits and among the States on this very point, including a direct confrontation between the Third Circuit, which holds that habeas corpus relief must be granted, and the Supreme Court of New Jersey, which insists that the Third Circuit is wrong. Holding that *Escobedo* applies notwithstanding failure to request counsel are: *United States ex rel. Russo v. New Jersey*, 3d Cir., May 20, 1965, 33 U.S.L.W. 2621; *Wright v. Dickson*, 336 F.2d 878, 882 (9th Cir.); *Galarza Cruz v. Delgado*, 233 F. Supp. 944 (D. P.R.); *People v. Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361, cert. den., 381 U.S. 937, 946; *State v. Neely*, 79 Ore. Adv. Sh. 257, 80 Ore. Adv. Sh. 69, 395 P.2d 557, 398 P.2d 482; *State v. Le Brun*, 402 P.2d 515 (Ore.); *State v. Dufour*, 206 A.2d 82 (R.I.); *State v. Mendes*, 210 A.2d 50, 52-55 (R.I.). Holding to the contrary: *Jackson v. United States*, 337 F.2d 136 (D.C. Cir.)

(Fahy, Jr., dissenting), cert. den., 380 U.S. 935; *Davis v. North Carolina*, 339 F.2d 770 (4th Cir.) (Sobeloff and Bell, JJ., dissenting), cert. den., 365 U.S. 855; *Otney v. United States*, 340 F.2d 696 (10th Cir.) (Murrah, C.J., dissenting); *Payne v. United States*, 340 F.2d 748 (9th Cir.) (Browning, J., dissenting); *United States v. Childress*, 347 F.2d 448 (7th Cir.); *State v. Ordog*, 45 N.J. 347, 212 A.2d 370, 378; *Commonwealth v. Tracy*, 207 N.E.2d 16 (Mass.); *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852; *State v. Fox*, 131 N.W.2d 684 (Iowa); *Commonwealth v. Coyle*, 415 Pa. 379, 203 A.2d 782; *Browne v. State*, 24 Wis. 2d 491, 129 N.W.2d 175, 131 N.W.2d 169, cert. den., 379 U.S. 1004; *People v. Hartgraves*, 31 Ill. 2d 375, 202 N.E.2d 33, cert. den., 380 U.S. 961; *Bean v. State*, 398 P.2d 251 (Nev.).

C. THE NEWLY-DISCOVERED EVIDENCE QUESTION.

Under Maryland law, newly-discovered evidence, no matter how cogent, is not available as a ground for setting aside a conviction with the academic exception of a new-trial motion filed within three days after verdict. As a result, petitioners, serving life sentences, have been and are precluded from obtaining judicial consideration of the massive new evidence of innocence which was not available at the trial and which the indigent accused and their appointed counsel could not possibly have discovered before trial. *Supra*, pp. 13-15.

In a modern, democratic society, infallibility may no more be attributed to courts than to royalty. And it is shocking that the policy against punishment of the innocent should be wholly sacrificed to the lesser policy favoring finality of judgments. Other jurisdictions have had no untoward results when they have accommodated the policies by allowing a reasonable time for new-trial motions alleging newly-discovered evidence. Cf. Rule 33, Fed. Rule Cr. Proc., allowing two years after final judgment.

Maryland's archaic procedural rule preventing the correction of miscarriages of justice violates due process because it offends a "fundamental" principle of justice (*Snyder v. Massachusetts*, 291 U.S. 97, 105), is "repugnant to the conscience" (*Palko v. Connecticut*, 302 U.S. 319, 323), and creates an "invidious discrimination" against those accused who are prevented by poverty from conducting extensive pre-trial investigations. *Griffin v. Illinois*, 351 U.S. 12.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

STATUTES AND RULES INVOLVED

1. Md. Code (1957) Art. 27, § 461, provides:

"§ 461: Rape generally.

Every person convicted of the crime of rape or as being accessory thereto before the fact shall, at the discretion of the court, suffer death, or be sentenced to confinement in the penitentiary for the period of his natural life, or undergo a confinement in the penitentiary for not less than eighteen months nor more than twenty-one years; and penetration shall be evidence of rape, without proof of emission."

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2. Art. 27, § 645A(a), Md. Code (1957), Cum. Supp. (1964), provides:

"§ 645A. Right of appeal of convicted persons.

(a) *Appeal in lieu of former remedies; when denied.*— Any person convicted of a crime and incarcerated under sentence of death or imprisonment, ... who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court . . . was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding under this subtitle to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction."

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3. Maryland Rules of Procedure (1963 Ed.), prescribed by the Court of Appeals of Maryland, contains the following provisions, among others, under Subtitle BK, Post Conviction Procedure:

"Rule BK40. How Commenced—Venue.

A proceeding under the Uniform Post Conviction Procedure Act shall be commenced by the filing of a verified petition in a court having criminal jurisdiction in the county where the conviction took place."

"Rule BK 44. Hearing.

* * *

d. *Evidence.*

The court may receive proof by affidavit or deposition and may also take oral testimony or other evidence, where justice so requires."

"Rule BK45. Order of Court.

a. *Scope.*

After the hearing the court shall make such order on the petition as justice may require. In the event the order shall be in favor of the petitioner, the court may also provide for rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.

* * *

c. *Finality.*

Such order shall constitute a final judgment for purposes of review."

4. Rules 567a and 759a of the Maryland Rules of Procedure provide:

"Rule 567. New Trial . . . Law[1]

a. *Motion —When to Be Filed.*

A motion for a new trial shall be filed within three days after the reception of a verdict, or, in case of a special verdict or a trial by the court within three days after the entry of a judgment *nisi*."

"Rule 759. Motions After Verdict.[2]

a. *Motion for New Trial.*

A motion for a new trial shall be made pursuant to Rule 567 (New Trial). A motion for a new trial shall be heard by the court in which the motion is pending, except that in the case of a motion for a new trial pending in the Criminal Court of Baltimore, such motion shall be heard by the Supreme Bench of Baltimore City. The court may grant a new trial if required in the interest of justice."

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5. Article XV, Section 5 of the Constitution of Maryland provides:

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass on the sufficiency of the evidence to sustain a conviction."

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[1] Rule 567 is a civil rule.

[2] Rule 759 is included in Chapter 700, entitled "Criminal Causes."

APPENDIX B

THE OPINION AND JUDGMENT BELOW

IN THE COURT OF APPEALS OF MARYLAND

NO. 443.

SEPTEMBER TERM, 1964

STATE OF MARYLAND

v.

JAMES V. GILES
and
JOHN G. GILES

Hammond
Horney
Marbury
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Carter, J. DeWeese
(specially assigned),

JJ.

Opinion by CARTER, J.
Hammond and Oppenheimer, JJ. dissent.

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This is the third time the appellees, James V. Giles and John G. Giles, have been before this Court in connection with matters pertaining to their convictions for rape. In *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962), *appeal dismissed* 372 U.S. 767 (1963), we affirmed convictions for rape committed by the appellees on a sixteen year old girl in Montgomery County on July 20, 1961. We subsequently affirmed the denial of a motion for a new trial based on newly discovered evidence in Giles v. State, 231 Md. 387, 190 A.2d 627 (1963). The case at bar is an appeal by the State from the action of the Circuit Court for Montgomery County in granting the appellees a new trial on the rape charge under the provisions of the Post Conviction Procedure Act after it had ruled as a preliminary matter that the appellees were authorized to take depositions in post conviction proceedings. The new trial was awarded following the finding of the lower court that the prosecution had suppressed and withheld evidence from the appellees in violation of their constitutional right to due process.

On this appeal the State raises two questions. First, it contends that because the rules relating to the taking of depositions in civil proceedings are not applicable to proceedings under the P.C.P.A., it was error to permit the taking of depositions. The primary contention of the State, however, is that the new trial was improperly granted for two reasons. One, that the failure of the prosecution to turn over to the defense information it had pertaining to an alleged rape complaint, concerning an incident involving the prosecutrix (but not the appellees) that occurred after the rape for which the appellees were convicted but before the trial of their case, and, two, that the neglect to inform the defense of an alleged suicide attempt by the prosecutrix following the alleged rape incident, also before the trial of the charges against them, did not deny the appellees their right to due process under the facts and circumstances of this case.

Aside from the questions presented by the State, the appellees, without having filed a cross-appeal, raise two questions decided adversely to them at the hearing below. They contend that Rule 759 a, together with Rule 567 a, requiring motions for a new trial in a criminal case to be filed within three days after verdict is a denial of due process; and that the admission into evidence at the trial of the original case of statements made by them when they were prime suspects, without advising them of their right to remain silent, and at a time when they were without counsel, was also a violation of due process. While the new trial was granted on the basis of the suppression of evidence relating to the alleged rape complaint and alleged suicide attempt the appellees would have us review all evidence concerning the sexual promiscuity of the prosecutrix, her claimed near probation status at the time of the rape, and her mental condition and health on the theory that evidence pertaining to these matters was also suppressed.

The undisputed and disputed facts surrounding the incident of July 20, 1961, which led to the convictions for rape were set forth in *Giles v. State, supra* (229 Md.). That case disclosed that on July 20, 1961, Joyce Roberts (the prosecutrix) and Stewart Foster were approached by three young colored males as they sat in an automobile in a secluded spot in Montgomery County. An argument ensued which resulted in the smashing of the automobile windows by the intruders and the unlocking of the doors of the vehicle. Stewart tried to ward off the attack but was knocked unconscious. Joyce got out of the vehicle and fled into the woods where, after a short distance, she tripped and fell. She hid in the underbrush but shortly thereafter was discovered by the three youths. She claimed that all three then had intercourse with her against her will and without her consent and that she put up little resistance because it appeared obvious to her it was futile to do so. John Giles claimed that after he found the prosecutrix she insisted he have intercourse

with her but he declined. James Giles testified that the prosecutrix invited all three of them to have intercourse with her and that she specified the order in which they were to do so, and when his act was interrupted by lights from a police car all three fled the scene. Both of the Giles brothers testified that the prosecutrix told them she would have to say she had been raped if they were caught in the woods because "she was on a year's probation" or "was in trouble." Subsequent to their arrest, the appellees gave statements to the police in which James admitted he had intercourse with the girl but John denied such an act.

Sometime after the affirmance of the rape convictions we had before us the appeal by the appellees from a denial of a motion for a new trial based on newly discovered evidence. The claimed newly discovered evidence primarily involved the testimony of Stewart Foster at the criminal trial and extrajudicial statements made by him to a girl friend concerning the person or persons responsible for provoking the attack on the automobile in which Foster and the prosecutrix were sitting prior to the rape. Based on the rule requiring motions for a new trial in criminal cases to be made within three days after verdict we affirmed the denial of the motion. Subsequent to this the death sentences imposed on the appellees were commuted to life imprisonment. Thereafter relief was sought by the appellees under the P.C.P.A. which resulted in this appeal by the State from the granting of the relief sought.

At the hearing in the post conviction proceeding it was shown that about September 1961 a member of the Montgomery County Bar was appointed to represent the appellees as indigent defendants. He made an investigation of the case which included a discussion of the matter with the State's Attorney for Montgomery County and an examination of the prosecution's entire file, including the police report. While counsel for the appellees was prohibited from discussing the case with Joyce Roberts by her

mother, he knew the facts surrounding the alleged consent of the prosecutrix from his discussions with the Gileses. Although he tried to examine the records of the juvenile courts in Montgomery and Prince George's Counties, the attorney was not permitted to see those records.

The most pertinent evidence adduced at the post conviction hearing involved an alleged suicide attempt by the prosecutrix and an alleged false rape claim. It was shown that on August 26, 1961, about five weeks after the rapes by the appellees and Joseph Johnson, the prosecutrix went to a party in Prince George's County and that when she entered a bathroom a boy followed her and had intercourse with her against her will. The extent of her resistance was to remove his hands from her body several times. Shortly thereafter another boy had intercourse with her in the yard of the premises where the party was being held which was against her will, but she offered no resistance to this act. On previous occasions the prosecutrix had had intercourse with one of the boys and would have consented to both acts on this occasion but for the fact she was fearful they would tell other boys at the party and they would all want to do the same thing. The following morning Joyce was admitted to the Prince George's General Hospital after having taken an overdose of bufferin tablets and sleeping pills in what was diagnosed as an attempted suicide. The above facts were brought out at the post conviction hearing by the testimony of Sgt. Wheeler of the Prince George's County police who interviewed the prosecutrix in the hospital on August 30, 1961, after he had received a complaint from Joyce's father that she had been raped at the party on August 26, 1961. Joyce Roberts was not called as a witness at the post conviction hearing.

While the prosecutrix was in the hospital for having taken the overdose of pills she was visited by a boyfriend who asked her why she had taken the pills. She told him she had been raped and that this was her reason for tak-

ing the pills. Without Joyce's knowledge the boy informed her mother of the incident of August 26 as related to him by Joyce. The prosecutrix' father then made a complaint of the alleged rape to Lt. Whalen of the Montgomery County police. The officer told Joyce's father to contact the Prince George's County police since the alleged rape had taken place in that county. Lt. Whalen made no investigation of the complaint nor of the facts surrounding the overdose of pills taken by Joyce of which he was also informed. He was never affirmatively informed that Joyce had attempted suicide. Although Lt. Whalen was aware of the fact that Joyce's mother had at one time taken her to see a psychiatrist, he did not have any information that Joyce was mentally disturbed or mentally ill. Aside from not pursuing any of the facts surrounding the incident of August 26th and the taking of the overdose of pills, Lt. Whalen did not make any investigation into the character of the prosecutrix when he was investigating the rape complaint of July 20, 1961.

It was after being advised by Lt. Whalen to report the incident of August 26th to the Prince George's County police that Joyce's father made the complaint which resulted in Sgt. Wheeler's visit to the hospital. At the time of the interview Sgt. Wheeler did not know that Joyce was the complaining witness in a rape case in Montgomery County. After relating the incident that occurred at the party to the police officer, Joyce informed him that she did not wish to make any complaint of rape and that she had not authorized any such complaint to be made. Based upon these statements and upon Joyce's assertion that she would refuse to testify if any such complaint was pursued, Sgt. Wheeler, with the consent of Joyce's father, marked the case "closed and unfounded."

The State's Attorney for Montgomery County testified at the post conviction hearing that prior to the trial of the criminal case he knew Joyce Roberts had been hospitalized for taking excessive drugs and, although he had no direct information of any suicide attempt he suspected

the drug incident might have been connected with the occurrence of July 20, 1961. The prosecutor had been informed of a rape charge in Prince George's County involving Joyce Roberts in which the charge was made by another, but he was also aware that the charge had been investigated and dropped.

With respect to the overdose of sleeping pills as indicating an attempted suicide by the prosecutrix, the records of Prince George's General Hospital disclosed that Joyce Roberts was admitted on August 27, 1961, following the taking of an overdose of bufferin tablets and sleeping pills in a suicide attempt, secondary to "adjustment reaction of adolescence." The record showed that the prosecutrix was given an admitting diagnosis as a psychopathic personality, placed in the psychiatric ward, and discharged after nine days. The case history stated that "this present episode is result of parental arguing, incompatability with parents, and difficult adjustment." The attending physician diagnosed the condition of the prosecutrix as an adolescent reaction. In the opinion of a psychiatrist the prosecutrix was mentally ill at the time of the attempted suicide since he considered an attempted suicide by a teenager as evidence of psychopathology, a mental disorder. He recognized, however, that many conditions, not derived from mental illness, could cause a suicide attempt and that the fact that prosecutrix may have been mentally ill on August 26, 1961, would not permit an opinion as to her mental condition at the date of the trial several months thereafter.

Aside from the evidence hereinbefore set forth, several affidavits were filed at the post conviction hearing. These affidavits, executed by acquaintances of Joyce Roberts, indicated that she was a sexually promiscuous girl.

While the primary question before us concerns the suppression of evidence we shall first dispose of the two questions decided adversely to the appellees as to which

they did not appeal; and the question relating to the taking of depositions in post conviction proceedings. The appellees contend they are entitled to have this Court consider the questions raised by them below as to the constitutionality of the Maryland Rule requiring motions for a new trial based on a newly discovered evidence to be filed within three days after verdict and the admission in evidence at the criminal trial of statements made by them when they were without counsel and not advised of their right to remain silent. Notwithstanding the fact that these claims were overruled by the lower court and no cross-appeal was taken therefrom, the appellees contend that they are entitled to have the judgment below affirmed for these reasons in addition to those assigned by the lower court. Although the question of whether a cross-appeal need be taken appears to be a novel one in a proceeding of this nature, closely related rulings have been made supporting the appellees' position. It has been held that an appellant is not entitled to the reversal of a judgment favorable to the appellee, even though error was committed against the appellant below, where it appears from the record that a directed verdict in the appellee's favor should have been granted. Such rulings are predicated upon the theory that no ultimate prejudice is shown to the appellant if he could not recover in any event, even though he were granted a new trial. See *Ragonese v. Hilferty*, 231 Md. 520, 191 A.2d 422 (1963), and *Texas Co. v. Washington B. & A. R. Co.*, 147 Md. 167, 175, 127 Atl. 752 (1925). Assuming, without deciding, therefore, that the appellees are entitled to reassert the contentions raised below, they lack substance for the reasons hereafter stated.

With respect to the constitutionality of Rule 567 a, requiring motions for a new trial to be filed within three days of the date of the verdict, as made applicable to criminal cases by Rule 759 a, this Court, in *Giles v. State, supra* (231 Md.), ruled that a motion for a new trial in respect to the subject trial, not having been filed

within three days of the verdict as required by Rule 567 a, was for that reason properly denied by the lower court. In so ruling, it is implicit that the rule itself was a valid and constitutional procedural requirement. Although the rules of procedure authorize a motion for a new trial, we recently noted that in the absence of state constitutional or statutory requirements, due process does not guarantee one the right to file a motion for a new trial after conviction for a criminal offense. *Brown v. State*, 237 Md. 492, 498, 207 A.2d 103 (1965). There is no merit to the appellees' attack on the three day rule.

There is likewise no merit to the contention of the appellees that they had been denied their right to counsel by the admission of statements made when they were not represented by counsel and not affirmatively advised of their right to remain silent in violation of their right to due process. This same contention was raised in the recent case of *Cowans v. State*, 238 Md. 433, 209 A.2d 552 (1965), wherein we stated that we did not interpret the Supreme Court decisions in *Gideon v. Wainwright*, 372 U. S. 335 (1963), *Massiah v. United States*, 377 U.S. 201 (1964) and *Escobedo v. Illinois*, 378 U.S. 478 (1964), "as making an affirmative advising of an arrestee of his right to counsel, before the taking of a confession, a prerequisite to its admissibility (in a State prosecution) provided, of course, that the confession was freely and voluntarily given under the totality of the attendant circumstances, or that a failure to inform, explicitly, an arrestee of 'his right to remain silent' destroys the voluntariness of his confession and thereby renders it inadmissible." In adhering to this position, we hold that the lower court correctly refused to grant relief on the claim that the admission of statements made to the police was a violation of due process.

With respect to the authority of the appellees to take depositions in a proceeding of this nature, the lower court found that proceedings under the P.C.P.A. are civil in nature and that the rules relating to civil proceedings

are applicable to them. The rules governing post conviction procedure are to be found in Rules BK40 through BK48 in Chapter 1100 titled "Special Proceedings" and not under Chapter 700 dealing with procedure in "Criminal Causes." And Rule 1000 titled "Special Proceedings - General Rules Applicable" provides that "the preceding Rules, Chapters 1, 100 to 600 inclusive and 800 are applicable to Special Proceedings dealt with in Chapter 1100, except insofar as the Rules contained in Chapter 1100 otherwise provide expressly or by necessary implication." Regardless therefore of whether the rules governing post conviction proceedings are civil in nature, there seems to be little doubt, since Rule 1000, providing that Chapter 400 (Depositions and Discovery) is applicable to Chapter 1100 (Special Proceedir), that the authorization to take depositions in post conviction proceedings was proper, and we so hold.

The principal question involved in the case at bar relates to the failure of the prosecution to turn over to the defense prior to the trial of the criminal case information it had pertaining to the alleged rape complaint arising out of the incident of August 26, 1961, and the attempted suicide. The court below found that this information could reasonably be considered admissible and useful to the defense and therefore the failure of the prosecution to disclose it, even though it may not have been withheld for an improper motive, amounted to a suppression of evidence in violation of the rights of the appellees to due process of law.

It is clear that the suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process and is ground for relief under the P.C.P.A. *Brady v. State*, 226 Md. 422, 174 A.2d 167 (1961), *aff'd.* 373 U.S. 83 (1963); *Strosnider v. Warden*, 228 Md. 663, 180 A.2d 854 (1962). The appellees contend that for the purpose of determining the applicability of the suppression rule, evidence is material if it could reasonably have been considered admissible and useful to

the defense regardless of whether it is technically admissible and useful in the sense that it contradicts trial evidence. The appellees rely on *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950), and *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), and further contend that if the *Griffin* admissible and useful test is met the withholding of evidence amounts to a denial of due process if the State had knowledge of the evidence and the defense did not.

While we agree that evidence which is claimed to have been suppressed must be reasonably considered to be admissible and useful before suppression may be said to exist, this is not the sole test in determining when a suppression of evidence can be said to amount to a denial of due process. Not only must the evidence withheld be admissible and useful, but it must be such, if it had been offered in evidence, as would be capable of clearing or tending to clear the accused of guilt — i.e., it must be exculpatory. For a definition of "exculpatory" see *Dean v. State*, 381 P.2d 178 (Okla. 1963).

Although the Circuit Court of Appeals in *Griffin v. United States, supra*, recognized the necessity of the prosecution disclosing evidence that "may reasonably be considered admissible and useful to the defense" under the facts of that case, it is clear that the undisclosed evidence, which concerned threats of the victim toward the person accused of murder, was obviously material and exculpatory evidence to which a jury would attach significance. Likewise, in *Barbee v. Warden, supra*, which followed the reasonably admissible and useful language of *Griffin*, the evidence suppressed, which was a police department ballistics report to the effect that the gun found in the defendant's car and described by witnesses as similar to the one carried by him at the time of the shooting was not the gun used in the shooting, the nondisclosure was properly held to be a denial of due process in that the evidence was material and exculpatory to the accused. For holdings that the evidence sup-

pressed must be material to the guilt or innocence of the accused or to the penalty to be imposed in order to constitute a denial of due process, see *State v. Morris*, 365 P.2d 668 (N.M. 1961) and *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, where the accused made a request for evidence that had not been disclosed, the Supreme Court held that the suppression of evidence by the prosecution favorable to an accused was violative of due process where the evidence was material either to guilt or to punishment.

We think that in order for the nondisclosure of evidence to amount to a denial of due process it must be such as is material and capable of clearing or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in addition to being such as could reasonably be considered admissible and useful to the defense. And, as pointed out in *Barbee*, in a situation involving passive nondisclosure an inquiry must be made into the question of whether the nondisclosure may have operated to the prejudice of the accused. Certainly there should be no duty on the prosecution to disclose evidence that is available to the accused or lacking in probative value, or, in some circumstances, evidence that is merely circumstantial. See *Jordon v. Bondy*, 114 F.2d 599 (D.C. Cir. 1940) and *Butt v. Graham*, 307 P.2d 892 (Utah 1957). See also *Brady v. Maryland, supra*, and 60 Colum. L. Rev. 858. The defense may be as well able to explore outside sources of information as the prosecution. *United States v. Lawrenson*, 298 F.2d 880 (4th Cir. 1962).

In order to decide what evidence can be said to have been suppressed it is first necessary to determine what the prosecution was charged with knowing. As was pointed out in *Barbee*, at p. 846, "the police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." It would not be unreasonable therefore to charge the prosecutor and his agents who have the duty of preparing and presenting the case, with knowledge of all

seemingly pertinent facts related to the charge which are known to the police department who represent the local subdivision that has jurisdiction to try the case. Under this rule the State's Attorney for Montgomery County should be charged with knowledge of those facts known to the police department of that county. Thus all knowledge of Lt. Whalen pertaining to the prosecutrix would be chargeable to the State's Attorney. To go further would impose a practically impossible and unworkable burden on local authorities.

Applying the criteria above set forth to the facts of the case at bar, the strongest reasonable inference which the prosecution could conclude from the information known to it when considered in connection with other evidence in the case, would appear to be: that Joyce Roberts had probably been involved in some sexual activities with boys on the evening of August 26th under circumstances not amounting to criminal rape, on which her father preferred rape charges, but which investigation showed were groundless; that on the same evening she had intentionally taken an overdose of sleeping pills in an attempt to commit suicide and as a result had been admitted to a hospital; and that for reasons known only to her mother, the mother had taken her daughter to a psychiatrist.

As we see it, the prosecution should disclose to the defense such information as it has that may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory, and where there is doubt as to what is admissible and useful for that purpose, the trial court should decide whether or not a duty to disclose exists. Assuming that there was reason for doubt on the part of the prosecution in this case as to whether the evidence known to it was reasonably admissible and useful as tending to affect guilt or punishment and that there was therefore a duty to disclose it, we think the failure of the prosecution to disclose the information relating to the alleged rape of August 26th and the subsequent suicidal attempt was not prejudicial to

the appellees and did not therefore warrant the granting of a new trial on the basis of the denial of due process. We shall first consider the attempted suicide, which the lower court found to be evidence of mental derangement and admissible for the purpose of impeaching the credibility of the prosecutrix.

The attempted suicide is said to be admissible and useful for purposes of showing that the prosecutrix was mentally incompetent as a witness and for purposes of impeaching her credibility as a witness. The record, however, does not disclose any medical or other competent evidence to establish or even indicate that if the attempted suicide on August 26, 1961, had been known to the defense, together with all other facts and circumstances shown by the record, that such information could collectively consconstitute a legally sufficient basis upon which an opinion could be predicated that the prosecutrix was mentally incompetent as a witness on the date of the trial in December 1961, or that her testimony was not to be believed. Although the psychiatrist called by the appellees at the hearing below testified that an attempted suicide by a teenager was in his opinion evidence of mental illness, he stated that an attempted suicide on August 26, 1961, would not permit an opinion as to the mental condition of the prosecutrix at the date of the trial. As the testimony of the psychiatrist disclosed, an attempted suicide may result from causes not connected with mental illness. The State's Attorney for Montgomery County, when he first heard of the attempted suicide, believed it may have been related to the incident of July 20, 1961. Certainly it would not be unreasonable for a jury to conclude that an attempted suicide by a teenage girl was indicative of emotional disturbance caused by an attack upon her by three young colored males. Based on the evidence relating to the attempted suicide that was claimed to have been suppressed, there is nothing to indicate that the suicide attempt was material to the competency of the prosecutrix as a witness at the criminal trial or to the question of consent.

Neither the case of *State v. Poolos*, 85 S.E.2d 342 (N.C. 1955), nor *Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1961), relied on by the appellees are persuasive on this point. The former case was one in which a question asked a witness for the state as to a prior attempt to commit suicide was said to be proper for purposes of impeachment. In the latter case, the prosecution knowingly suppressed evidence of the insanity of a witness and of a statement made by him to the police in contradiction of his testimony at the trial. Even if evidence in the case at bar as to the attempted suicide were admissible we do not think it would be material to the guilt of the appellees or the punishment to be imposed in light of the facts surrounding the attempted suicide which clearly showed that it was an outgrowth of an incident totally unrelated to the one for which the appellees were convicted of rape. Inasmuch as this evidence in no way showed the prosecutrix was mentally incompetent as a witness, or would have been in contradiction of any of the testimony given by her at the criminal trial, we find that its probative value was such as not to have been material to the credibility of the prosecutrix and therefore the failure of the prosecution to disclose such information did not amount to a denial of due process.

With respect to both the attempted suicide and the alleged false rape claim, it is important to note that we have held that specific acts of misconduct are not admissible to affect the credibility of a witness, for credibility must ordinarily be attacked by evidence of general reputation for truth or veracity or material contradictory facts. *Rau v. State*, 133 Md. 613, 105 Atl. 867 (1919); *Shartzer v. State*, 63 Md. 149 (1885). With respect to the alleged rape claim as evidence of the prosecutrix' general reputation for unchastity, the court below found that the appellees knew of the unchastity of the prosecutrix prior to the trial of the criminal case. Where consent is at issue, specific acts of intercourse with others prior to the alleged rape are not admissible to establish lack

of chastity. But evidence of general reputation for unchastity is admissible. See *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Humphreys v. State*, 227 Md. 115, 175 A.2d 777 (1961); *Shartzer v. State*, *supra*. By the Gileses version of the incident of July 20, 1961, as related to their attorney, the defense certainly had some question as to the character of the prosecutrix which properly could have been investigated. In view of this and as evidenced by the examination of witnesses at the criminal trial, the defense must have known of the prosecutrix' general reputation for unchastity and that she was a sexually promiscuous girl. It is difficult therefore to see how evidence of the alleged rape claim would have added anything of consequence to what the defense already knew or should have known.

The court below, in relying on *Smallwood v. Warden*, 205 F.Supp. 325 (D. Md. 1962), was of the opinion that the rape claim was admissible for purposes of impeachment, but in that case, where the question was one of adequacy of counsel, the prosecution, unlike the case at bar, had knowledge of the history, physical condition and reputation of the prosecuting witness, all of which was said to have likely affected the result of the trial. While evidence of a rape claim may be relevant when the basis for the claim is clearly lacking, the record here shows that the prosecutrix did not make a complaint and that she cannot therefore be said to have made a false rape claim. There was in this case no evidence from which a jury could have concluded that since a false rape claim was intentionally made by the prosecutrix on one occasion it raised considerable doubt as to the validity of the claim made against the appellees. However the incident of August 26th may be interpreted it permits of no conclusion that the prosecutrix made a false rape claim. The claim was made by her father after statements made by the prosecutrix to a boyfriend were communicated to him. While Joyce freely discussed the incident with Sgt. Wheeler she denied that any rape had occurred. Thus,

the only possible use of the facts surrounding the alleged rape claim would be for purposes of showing the unchastity of the prosecutrix, a fact that was already known to the defense at the time of the rape trial.

The appellees, however, argue that the subsequent rape claim goes to credibility and is material to the mental illness of the prosecutrix. It is their contention that evidence of her sexual promiscuity and of the alleged rape claim shows she is afflicted with nymphomania — a type of mental illness. While evidence of nymphomania was held admissible in *People v. Bastian*, 47 N.W.2d 692 (Mich. 1951), to conclude that such an illness existed in the case at bar would be to engage in sheer speculation and conjecture. What the appellees would have us do is to take the facts presented at the post conviction hearing and to draw conclusions therefrom that are not supported by the record. Even if the prosecutrix can be said to have been suffering from nymphomania, there is nothing to show that this made her incompetent as a witness or that she consented to the acts for which the appellees were convicted.

Although the new trial was granted by the court below solely on the suppression of evidence relating to the alleged suicide attempt and alleged rape claim, both of which arose out of the incident of August 26th, the appellees also claim that evidence was suppressed as to the near probation status of the prosecutrix and as to the fact that her mother had taken her to see a psychiatrist. Without prolonging an already lengthy opinion in this case which the appellees seek to retry on an appeal by the State, it will suffice to say that there is nothing in the record to show a withholding of evidence with respect to either of these matters.

We hold that the evidence held by the lower court to have been suppressed was neither material to the guilt of the appellees or to the punishment to be imposed, nor was the failure to disclose prejudicial to the accused. The

nondisclosure, therefore, cannot be said to have amounted to a denial of due process.

ORDER REVERSED; THE APPELLEES TO PAY THE COSTS.

[Dissenting Opinion]

Oppenheimer, J. files the following dissenting opinion in which Hammond, J. concurs.

The evidence admittedly withheld by the State, in my opinion, could have been of vital importance to the defense of the accused and its withholding constituted a violation of due process of law.

The appellees' defense to the charge of rape was that their assault upon the white companion of the prosecutrix was provoked by his obscene racial remarks and that the prosecutrix not only consented to intercourse with two of the appellees but suggested it and invited it.[1] The appellees testified that the prosecutrix, prior to any acts of intercourse, had said to them that she had already had sexual intercourse with sixteen or seventeen boys that week and two or three more wouldn't make any difference. The appellees also testified that the prosecutrix, while consenting to the intercourse, said that she was on probation and if caught by the police would have to claim that she was raped. This testimony was denied by the prosecutrix at the trial and obviously was not believed by the triers of fact who convicted the appellees.

The essential facts established at the post conviction hearing are not in dispute. Detective Lieutenant Whalen

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[1] In Giles v. State, 229 Md. 370, 183 A.2d 359 (1962), in affirming the appellees' convictions on appeal, we referred to the conflicting evidence as to consent. The complete transcript of the testimony at the trial was introduced in the hearing under the Post Conviction Procedure Act as a result of which Judge Moorman granted a new trial. The entire testimony at the criminal trial is therefore before us on this appeal.

of the Montgomery County Police Department, prior to the trial of the appellees, had received a call from the family of the prosecutrix stating that she had been raped by two men in August of 1961, which was about five weeks after the acts for which the appellees were to be tried. The lieutenant had also received information that the prosecutrix had taken a number of sleeping pills and had been taken to the hospital. He had previously known that at one time the mother of the prosecutrix had taken her to see a psychiatrist. Upon receipt of the call as to the alleged rape, Lieutenant Whalen told the prosecutrix's father to get in touch with the Prince George's County Police, since the alleged rape had taken place in that county. The State's Attorney for Montgomery County had also been informed before the trial of the appellees that a complaint had been made in Prince George's County that the prosecutrix had been raped by other persons after the acts for which the appellees had been charged and he was aware that the subsequent charge had been investigated and dropped. The State's Attorney had also been informed that the prosecutrix had been hospitalized for taking an overdose of drugs and assumed that she had done so intentionally. None of this information known by the police lieutenant and the State's Attorney was communicated to the court appointed counsel of the appellees prior to their trial and their counsel had no knowledge thereof.

In *Brady v. State*, 226 Md. 422, 174 A.2d 167 (1961), we held that the suppression or withholding by the State of material exculpatory to an accused is a violation of due process even if, as here, the withholding is not the result of guile. In that case, the State contended that the evidence withheld, which was an extra judicial confession or admission by a third party that he had committed the offense for which the defendant was tried, was not admissible. In delivering the opinion for the Court, Chief Judge Brune considered the authorities pro and con as to whether or not such a confession was admissible. With-

out coming to any conclusion as to its admissibility, Judge Brune said, for the Court:

> "We think that Boblit's undisclosed confession might have been usable under any of the three rules stated in *Thomas*, which we have quoted above, and hence could not be regarded as inadmissible and unusable in any manner in Brady's defense."

Judge Brune's opinion goes on to say:

> "There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. To apply the words of the Supreme Court of the United States in *Griffin v. United States*, 336 U.S. 704 at 708-709, quoted by the Court of Appeals of the District of Columbia Circuit in its opinion on remand of the case, above cited (183 F.2d at 992), it seems to us (as it did to the Court of Appeals of the District in *Griffin*) that it would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.
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> "Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady." 226 Md. at 429-30.

In the words of the Court of Appeals in *Griffin v. United States*, "when there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful."

In this case, the information withheld by the prosecution, in my opinion, would have been admissible, in whole

or in part, on cross-examination of the prosecutrix and was clearly usable in the defense of the appellees. The lodging of a complaint of rape on behalf of the prosecutrix and the subsequent withdrawal of the complaint took place between the alleged offenses of the appellees and their trial. These facts could well have been used to support the claim of the appellees that the prosecutrix consented to intercourse with them and thereafter, as they said she had told them she might do, made an unjustified claim that she had been raped.

The withheld evidence of her attempted suicide might well have been used by counsel for the appellees to attack the credibility of the prosecutrix because of mental or emotional illness. While I have not been able to find a Maryland case deciding whether or not testimony of mental illness or emotional disturbance not amounting to insanity is admissible for the purpose of discrediting the prosecutrix in a sex case, there is authority elsewhere holding such evidence to be admissible.[2] The suppressed information might also have been used by the appellees in an endeavor to show that the prosecutrix was a nymphomaniac.[3]

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[2] Taborsky v. State, 142 Conn. 619, 116 A.2d 433 (1955). See also United States v. Hiss, (D.C.S.D.N.Y. 1950), 88 F.Supp. 559. Contra. Garrett v. Alabama, 268 Ala. 299, 105 So.2d 541 (1958).

[3] In People v. Bastian, 330 Mich. 457 (1951), it was held that on a trial for statutory rape the trial court was in error in sustaining an objection to a line of cross-examination which counsel for the defendant said would tend to establish that the prosecutrix was a sexual psycopath. The Supreme Court of Michigan held that the proffered testimony was relevant to the credibility of the prosecutrix, particularly if sufficient to indicate that she was a nymphomaniac. People v. Cowles, 246 Mich. 429, 224 N.W. 387 (1929) is to the same effect.

"Occasionally is found in woman complainants, testifying to sex-offences by men, a dangerous form of abnormal mental-

(*footnote 3 continued*)

As in *Brady*, the test is not whether the evidence clearly would have been admissible but whether it must be regarded as inadmissible and unusable in any manner in defense of the appellees. The question of actual admissibility, particularly in a case such as this, can only be passed upon in the context of actual cross-examination and proffered testimony. Such cross-examination and additional testimony might well have been admissible and, if admissible, were usable in the defense of the appellees. That is clearly sufficient.

The opinion of the majority holds that the information withheld by the State was not material evidence exculpatory to the appellees. With all deference, it seems to me that my brethren are arguing the weight of the evidence and put themselves in the place of the triers of the facts. While counsel for the appellees knew of prior acts of unchastity of the prosecutrix, the additional withheld evidence might have made possible a far more effective cross-examination than mere knowledge of prior acts of unchastity of itself permitted.

What has been said pertains only to the actual information known to and withheld by the State's Attorney and Lieutenant Whelan. However, this information, important as it was of itself to the defense, was also usable as the basis for further investigation. Although the prosecution did not choose to investigate further the information

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(footnote 3 continued from preceding page)

ity, — dangerous here, because it affects testimonial trustworthiness while not affecting other mental operations. It consists in a disposition to fabricate irresponsibly charges of sex-offenses against persons totally innocent. The genesis and operations of this quality are sufficiently shown in the passages quoted *ante* § 924a (character for chastity). Sometimes it is associated with unchaste conduct in the witness, sometimes not. But its nature is well known to psychiatrists and is recognizable by them. Testimony to its existence in an individual should always be receivable." Wigmore on Evidence, § 934a (3rd ed. 1940).

which had been received, if that information had been made available to the appellees' counsel, it would have been a short and logical step for him to pursue what had happened in Prince George's County after the claim of the alleged rape had been made and after the prosecutrix had been hospitalized there. He could have easily ascertained the additional facts adduced at the post conviction hearing. These facts included the statements of the prosecutrix to Detective Sergeant Wheeler of the Prince George's County Police that during the preceding two years she had had numerous acts of sexual intercouse with a large number of boys and men, many of whom were unknown to her, and that she had accused two men in the Prince George's County incident of rape to explain why she took the overdose of pills, although she also told Wheeler that she would refuse to testify against the two men if they were charged with rape. The hospital record of Prince George's General Hospital showed the diagnosis of attempted suicide by the prosecutrix and the admitting diagnosis of psychopathic personality. An interview with Dr. Connor, who testified in the post conviction hearing, would have readily shown that the prosecutrix had been confined in the hospital's psychiatric ward for nine days.[4]

This additional information would have materially strengthened the usable lines of defense inherent in the information actually withheld by the prosecution. It seems clear to me that the facts which the State knew and did not communicate would have been helpful to counsel for the appellees in pursuing the new important lines of inquiry obviously indicated. The State can not claim the withheld information was unusable by the defense because the prosecution chose to know no more.

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[4] Testimony that a witness has been confined in a mental hospital has been held admissible on the issue of credibility. Walley v. State, 240 Miss. 136, 126 So.2d 534 (1961); People v. Kirkes (Cal. Dist. Ct. App. 1952) 243 P.2d 816.

The *Brady* and *Griffin* rule rests on basic principles of fairness. If information is withheld by the prosecution and if that information, although not pursued by the prosecution, of itself would have reasonably led to the procuring of information usable in any manner in the defense of the accused, that fact of itself should make the withholding of the uncommunicated matters the basis for a new trial. We are dealing here with capital charges. The appellees were represented by court appointed counsel who, however able and conscientious, could not have the facilities of investigation available to the State. The information withheld would have made the procuring of the further, and possibly vital, information easily obtainable.

The issue before us is not the guilt or the innocence of the appellees but whether, under all the circumstances, the withholding of the information by the State constituted a violation of due process. In my judgment, it clearly did. I would affirm the order of Judge Moorman granting a new trial.